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I. Introduction

On June 2, 1975, the United States Supreme Court issued its landmark decision in *Connell Construction Co. v. Plumbers and Steamfitters Local 100.*[1] That decision found what was previously considered to be a "legal" restrictive subcontracting agreement between a construction employer and a union to be violative of section 8(e) of the National Labor Relations Act (NLRA)[2] and subject to antitrust scrutiny.

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1. 421 U.S. 616 (1975).

2. The Labor Management Relations Act of 1974, 29 U.S.C. § 158(e) (1976), provides as follows:

> Enforceability of contract or agreement to boycott any other employer; exception
>
> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purpose of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

On November 13, 1978, the NLRB issued a series of decisions[3] that analyze section 8(e) in light of *Connell*. This article interprets what the Court said in *Connell* and what the NLRB says the Court said in *Connell*, and considers whether one may comfortably rely upon the NLRB's analysis, given the treble damage remedies available to plaintiffs who win antitrust cases.[4]

The Supreme Court's *Connell* decision and the Board's recent interpretation of that decision are perhaps best understood against a general background of the law regarding secondary boycotts and hot cargo agreements.

II. Secondary Boycotts and Hot Cargo Agreements

A. The Ground Rules

Generally speaking, section 8(b)(4)(B) of the National Labor Relations Act,[5] which prohibits secondary boycotts, provides that a union having a dispute with employer A may not strike or picket employer B to force the latter to cease doing business with A. Thus, for example, if the International Brotherhood of Electrical Workers (IBEW) has a dispute with an electrical subcontractor on a construction site, it may picket only at a separate gate set aside for the electrical subcontractor's employees and may not picket other gates in an effort to pressure the general construction contractor to remove the electrical subcontractor from the job. Picketing of the general contractor is a prohibited secondary boycott because the general contractor and the electrical subcontractor are different employers and because the removal of the subcontractor from the job would obvi-

3. Operating Eng'rs Local 701, 9 L.R.R.M. 1589 (1978); Los Angeles Bldg. & Constr. Trades Council., 99 L.R.R.M. 1593 (1978); Colorado Bldg. & Constr. Trades Council, 99 L.R.R.M. 1601 (1978); Carpenters Locals 944 & 235, 99 L.R.R.M. 1580 (1976).

4. The Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1976). 15 U.S.C. § 15 (1976) provides for threefold damages on behalf of anyone injured by an antitrust violation. *See* UMW v. Pennington, 381 U.S. 657 (1965).

5. 29 U.S.C. § 158(b)(4)(B) (1976) provides,

It shall be an unfair labor practice for a labor organization or its agents

. . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is

. . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

ously constitute a cessation of the business arrangement between the general and the sub. This type of picketing is called a "secondary boycott" for two reasons: first, the union's primary dispute is with the sub, whereas the dispute with the general contractor is only secondary to that dispute, and second, the reason for the picketing is to force the secondary general contractor to stop doing business with—to boycott—the primary disputant, the subcontractor. Furthermore, if the IBEW were to picket the construction job even before the electrical sub was hired in an effort to pressure the general contractor to refrain from hiring the sub at all, then that picketing would likewise constitute an unlawful secondary boycott. In other words, picketing to stop the general from even commencing a business arrangement with a sub is just as unlawful as picketing to terminate a business arrangement that has already begun.[6]

Section 8(e) of the Act also prohibits "hot cargo" agreements, which are nothing more than agreements to engage in a secondary boycott.[7] Thus, in the example above, if, instead of picketing, the IBEW and the general contractor *agreed* that the electrical sub would be removed from the job, that agreement would be covered by section 8(e) of the NLRA. The agreement to treat the electrical sub's work product as an unwanted commodity—a "hot cargo"—merely takes the place of the picketing that, in the earlier example, is a secondary boycott. And just as picketing to keep a sub from ever being hired in the first place is an unlawful secondary boycott, so is an agreement to that effect between the general contractor and the union an unlawful hot cargo agreement. Finally, any strike or picketing to pressure a contractor into entering an unlawful hot cargo agreement violates section 8(b)(4)(A).[8]

B. The Work Preservation or Union Standards Exception

Unfortunately for construction unions and contractors, but fortunately for labor lawyers, exceptions to these general rules exist. One important exception, which is not technically an exception, involves boycotts and hot cargo agreements that the NLRB and courts have found to be primary and not secondary. These so-called primary pickets or agreements are generally characterized as "work preservation" or "union standards" and are directed at a company that employs union-represented workers. Their purpose is to remove the company's financial incentive to take work away from the union-

6. *See generally* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). *See also* the cases cited in note 3 *supra*.

7. 29 U.S.C. § 158(e) (1976).

8. It is an unfair labor practice for a union to strike or picket for the purpose of "forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by [section 8 (e)]." *Id.* at § 158(b)(4)(A).

represented employees and subcontract it to another company that pays less or that provides cheaper or fewer benefits to its employees. For example, if the general contractor in the example above normally employed electricians under a contract with the IBEW that set certain wages and fringe benefits, the union could insist upon, and strike to obtain, an agreement with the general stating that the general may not subcontract any work historically performed by his IBEW- represented electricians *unless* the new subcontractor pays his employees an amount of wages and fringes equivalent to that called for in the IBEW contract. Thus, the following primary clause is not covered at all by section 8(e), is lawful, and remains so even after the *Connell* decision:

> The Employer agrees to recognize the territorial and occupational jurisdiction of the Union to the extent that it shall not use for the performance of any work within that jurisdiction, which has been historically and continuously performed by employees within the unit covered by this Agreement, any employer, company or concern that does not observe the equivalent of wages, fringe benefits, hours and economic conditions of employment as enjoyed by the employees covered by this Agreement.

The theory underlying the primary and lawful nature of these work preservation agreements is that the union-represented employees have a right to protect their jobs and bargained wages against the competition of cheaper labor, even though that right, exercised against their primary employer by strikes or agreements, results in a cessation or failure of their employer to do business with another company which pays less. This theory presumably works if the only subcontractors available to their employer pay the same amount of wages and fringes. Consistent with that theory, however, is the requirement that any agreement so restricting subcontracting must meet certain standards, two of which are particularly relevant to an analysis of *Connell*'s requirements.

First, the agreement must seek to protect only "unit work" as opposed to work of union members generally. Thus, an agreement between the IBEW and a general contractor that the latter will not subcontract carpentry work to one who does not pay the same wages and fringes as called for in the IBEW contract or the area's carpenter union contract would be a unlawful secondary hot cargo agreement, for the IBEW unit of represented employees does not ever perform carpentry work. Such an agreement seeks to protect union interests generally — not IBEW unit work.

Second, a restrictive subcontracting agreement is an unlawful secondary hot cargo agreement, even though it only restricts the general contractor in the subcontracting of unit work of IBEW members, if the general may subcontract only to a company that has an agreement with the IBEW or another union. This is unlawful be-

cause another agreement with the IBEW or any other union may not call for the payment of equivalent wages and fringes, and even if it does, it will contain non-economic items, such as arbitration and union security provisions, that ordinarly have nothing to do with removing the financial incentive to subcontract unit work, such as equalizing pay and benefits. This latter type of agreement, commonly referred to as a "union signatory" agreement, assists union interests generally by seeking to provide work for other union-represented employees, rather than seeking to preserve work for the primary IBEW unit employees. Accordingly, a union signatory agreement is a second hot cargo agreement that violates Section 8(e) of the Act unless it meets yet another exception to the general rules discussed earlier.[9]

The first proviso of section 8(e) legalizes an otherwise unlawful secondary hot cargo agreement if "the agreement is between a union and an employer in the construction industry, *and* the agreement only restricts subcontracting of work to be performed at the site of construction."[10] Thus, at least prior to the Supreme Court's decision in *Connell*, a construction contractor and any union lawfully could enter into a union signatory agreement providing that the contractor would not subcontract any construction site work to another company unless that company had an agreement with another union. Moreover, many assumed that these agreements could be lawfully negotiated without regard to whether (1) the union represented any of the general contractor's employees, (that is, whether or not a collective bargaining relationship existed between the general contractor and the union),[11] (2) the agreement related to any particular job site,[12] (3) the agreement restricted subcontracting of the general contractor's work only in the craft in which employees represented by the union seeking the agreement were employed,[13] and (4) the agreement required that the work could be subcontracted only to any em-

9. A Duie Pyle, Inc. v. NLRB, 383 F.2d 772 (3d Cir. 1967); Meat & Highway Drivers Local 710 v. NLRB, 335 F.2d 709 (D.C. Cir. 1964); Orange Belt Dist. Council of Painters No. 48 v. NLRB, 328 F.2d 534 (D.C. Cir. 1964); Heavy, Highway, Bldg., & Constr. Teamsters, et al., 227 N.L.R.B. 169 (1976); Carpenters Dist. Council, 220 N.L.R.B. 1241 (1975); International Union of Operator Eng'rs Local 12, 212 N.L.R.B. 343 (1974); UMW, 188 N.L.R.B. 753, 755 (1971) (Miller, Chairman, and Brown, Member, dissenting); International Bhd. of Electrical Workers, Local 437, 180 N.L.R.B. 420, 421 (1969). See also the cases cited at note 3 *supra*, and the NLRB General Counsel's Memorandum on *Connell*, 1976 LAB. REL. YEARBOOK 295, 308 n.27 (BNA) [hereinafter cited as the Connell Memorandum].

10. 29 U.S.C. § 158(e) (1976).

11. *See, e.g.*, Los Angeles Bldg. & Constr. Trade's Council, 214 N.L.R.B. 562 (1974); Plumbers Local 100 (Hagler Construction Co.), NLRB Case No. 16-CC-447 (May 1, 1974) and a published memorandum of the NLRB General Counsel (May 1, 1974).

12. *See, e.g.*, cases cited in note 11, *supra*. *See also* Northeastern Indiana Bldg. & Constr. Trades Council, 148 N.L.R.B. 854 (1964), *enforcement denied on other grounds*, 352 F.2d 696 (D.C. Cir. 1965).

13. *See, e.g., id.*

ployer who had an agreement with a specific union or unions.[14]

Because such an agreement was lawful under the 8(e) proviso, a union could strike to obtain it without violating section 8(b)(1)(A),[15] since that section only outlaws strikes to obtain agreements prohibited by 8(e).[16] Nevertheless, such an agreement could not and cannot be enforced by strike or picket action of the union because that activity would constitute a secondary boycott in violation of section 8(b)(4)(B)[17] — a section that has no proviso similar to that in 8(e).[18]

The following clause is an example of the kind of agreement many assumed was lawful, even though it was negotiated between a company and union having no bargaining relationship with each other:

> THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of the construction, alteration, painting or repair of any building, structure, or other works, that if the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to be executed, current, collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry.

The Supreme Court's decision in *Connell* seemed to at least question most of these prior assumptions, and, indeed, found the last quoted clause to be unlawful.[19]

III. The Connell Decision

In *Connell*, Local 100 of the Plumbers and Steamfitters sought to organize mechanical contractors in the Dallas area by picketing certain general contractors, including Connell, to obtain an agreement that the contractors would subcontract job site work within the jurisdiction of the union only to subcontractors who were parties to an agreement with Local 100. Local 100 had no bargaining relationship with Connell and did not seek to represent any of Connell's employees. Connell signed the agreement under protest and then sued the union under the Sherman Act to have the agreement declared invalid as violative of the antitrust laws.

The Court dealt with the question whether the proviso to section 8(e) of the Act privileged the agreement.[20] At the time of the decision, it appeared that the Court answered the question by finding

14. *See, e.g., id.*
15. 29 U.S.C. § 158(b)(4)(A) (1976).
16. *See* notes 2 and 8 *supra*.
17. 29 U.S.C. § 158(b)(4)(B) (1976).
18. *Compare id.* § 158(b)(4)(B) *with id.* § 158(e).
19. Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975).
20. *Id.* at 626-35.

that the agreement violated section 8(e) because three ingredients, all of which were necessary for an agreement to be lawful under the section 8(e) proviso, were missing: (1) the agreement was not made in the context of a collective bargaining relationship between the union (Local 100) and the employer (Connell); (2) the restriction of the agreement on subcontracting was not limited to a particular job site;[21] and (3) the agreement did not meet the basic purpose of the 8(e) proviso, which is to protect union employees from working alongside nonunion employees.[22]

Thus, the Court apparently read into the section 8(e) construction proviso requirements that had not previously been considered necessary. At the time of the Court's decision, and long before the recent Board cases, some attorneys who sought to insure against Labor Act and antitrust liability for their clients interpreted the Court to require a bargaining relationship and an agreement limited to a particular job, with the purpose to protect union members from working alongside nonunion employees.

A. The Bargaining Relationship.

Probably the clearest portion of the *Connell* decision indicated that a union would not be free to seek even a valid section 8(e) agreement unless it had a collective bargaining relationship with the contractor from whom it sought such an agreement. The Court commenced its discussion with the assumption that agreements such as the one sought by Local 100, which restricted subcontracting to only union firms, are powerful organizing tools because any subcontractor who desires work from a general contractor who had agreed to such a restriction would have to sign a union contract. The Court then characterized such agreements as tools for "top down" organizing that are used in an effort to force union recognition by construction subcontractors,[23] a practice that Congress intended to limit by enacting section 8(b)(7) and by its careful drafting of section 8(f) of the Act.[24] Section 8(b)(7) limited the use of recognitional picketing, and made provision for elections to determine if employees wanted

21. As discussed at note 44 and accompanying text *infra*, this requirement seemed to function in two ways: (1) the agreement must refer to *a* specific job; and (2) the agreement may require that any subcontractor be signatory to a union contract *only* on that specific job site.

22. As discussed at notes 45-50 and accompanying text *infra*, this requirement breaks down into three subrequirements. (1) The restriction may be applied only on jobs on which the union's members are or will be working. (2) The restrictive agreement can only prohibit subcontracting of on-site construction work to *non-union* employees and cannot specify any particular union or unions with whom an awardable subcontractor must have an agreement. (3) The subcontractor need only employ union labor at times when the general contractor will be using union labor on the site. *See* the Connell Memorandum, *supra* note 9, at 297-98.

23. 421 U.S. at 625.

24. *Id.* at 632-33.

union representation.[25] Section 8(f) permits "pre-hire" agreements in the construction industry, but only under safeguards maintaining the employee's right to refuse union representation.[26] Moreover, the legislative history of section 8(f) suggests that Congress did not intend to allow strikes or picketing for the purpose of extracting prehire agreements from unwilling employers.[27]

Therefore, the Court determined that Congress could not have intended section 8(e) proviso agreements to be used on a wholesale basis by unions for such organizing purposes because that would undo for the construction industry the carefully developed policy reflected by sections 8(b)(7) and 8(f).[28] It was equally clear to the Court, however, that Congress did intend that unions and construction employers be privileged to enter into some of these agreements despite their organizational impact. But in order to limit the impact of the agreements, and thus protect, to the extent possible, the congressional purpose to restrict "top down" organizing, the Court believed it necessary to limit the circumstances under which this organizing tool could be used to effectuate the overall intent of Congress.[29]

Given the strong federal policy in favor of collective bargaining agreements and relationships, the restrictive agreements clearly were intended to be privileged when they arose from a collective bargaining relationship. Congress, however, did not indicate a desire to privilege section 8(e) proviso agreements when the union and the employer were "strangers." In fact, the only legislative history surrounding the construction proviso to section 8(e) deemed relevant by

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25. 29 U.S.C. § 158(b)(7)(1976).

26. It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Id. at § 158(f).

27. *See* 421 U.S. at 632-33.

28. *Id.* at 633.

29. *Id.*

the majority indicated that Congress intended to allow these agreements to be made only in the context of a bargaining relationship.[30] To allow these agreements between strangers would create a loophole in the Act's restrictions against "top down" organizing that would be counter to the intent of Congress.[31] Accordingly, the Court held that restrictive subcontracting agreements in the construction industry were not privileged by the 8(e) proviso unless they were entered into in the context of a collective bargaining relationship.[32]

In addition, and consistent with its analysis of the congressional intent strictly to limit the use of such restrictive subcontracting and the attendant organizational and recognitional impact, the Court appeared to impose two more requirements for 8(e) proviso legality that seemed to be separate and distinct from the "bargaining relationship" requirement.

B. The Agreement Must Be Limited To A Particular Job Site.

The Court, evidencing again Congress' established concern that restrictive subcontracting agreements not be given such a broad ef-

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30. *Id.*

31. Although not discussed by the Court, to allow section 8(e) proviso agreements outside a collective bargaining relationship would present a significant practical problem. How would or could such agreements be terminated? Because the agreement would not depend upon the union's representation of any employees, or be subject to the usual termination provisions of collective bargaining agreements, it could go on forever, thus further expanding the impact of the union's "top down" organizing weapon.

32. Apparently, the requirement could also be met in the construction industry by a union's request for a Section 8(f) sanctioned agreement.

It seems clear from the Court's discussion of section 8(f), particularly in note 10, that a section 8(f) agreement involving a contractor who intended to use employees in the craft represented by the union would meet the Court's requirement of a "bargaining relationship." 421 U.S. at 631-32 n.10. *See* the Connell Memorandum, *supra* note 9, at 297, 304. It also seems clear from the discussion in note 10, however, that such an agreement would not be privileged if it involved an employer who did not intend to hire any of its own employees to do the work within the union's jurisdiction. Thus, the Court speculated that the agreement in the case it was discussing, Los Angeles Bldg. & Constr. Trades Council, 214 N.L.R.B. 562 (1974), might have been a section 8(f) agreement, but went on to indicate that, in addition, the agreement might have been approved by the Board because no one argued before the Board the lack of a collective bargaining relationship that would invalidate the agreement. 421 U.S. at 631-32 n.10.

It is doubtful, however, that any industrial employer who acts as its own general contractor may enter into a valid section 8(e) proviso agreement except in the unlikely event that the employer has a preexisting bargaining relationship covering present construction employees. If such an employer had no bargaining relationship with a construction union seeking such an agreement, any agreement would be violative of section 8(e). Furthermore, section 8(f) would be of no assistance, because even though the employer might be "in the construction industry" as that phrase is used in the section 8(e) proviso, it clearly would not be "an employer engaged primarily in the building and construction industry" as required by section 8(f). *See* Los Angeles Bldg. & Constr. Trades Council, 183 N.L.R.B. 1032 (1970). Thus, even if the industrial employer contemplated using employees in the union's jurisdiction, it could not enter into a valid section 8(f) relationship, and absent a preexisting bargaining relationship, any section 8(e) proviso agreement would violate section 8(e), and presumably, the antitrust laws. *But cf.* the Connell Memorandum, *supra* note 9, at 311 (suggesting that an employer engaged in the construction industry, but with no construction employees, can create a section 8(f) relationship if the employer did intend to have some craft employees).

fect that they create too large a loophole in Congress' limitation of "top down" organizing tools and tactics, seemed to hold that the 8(e) proviso was not intended to protect agreements unless they were confined to a particular jobsite. To determine if the Court really meant to impose this requirement, it is useful to review certain parts of the opinion.[33]

In discussing the 8(e) proviso the Court stated that Congress was focusing on a single situation; namely, "allowing subcontracting agreements only in relation to work done on *a* jobsite."[34] Therefore, the Court reasoned, Congress could not have intended the use of such agreements as a "broad organizational weapon."[35] Rather, Congress, which was dealing only with the problem raised by the *Denver Building Trades* case,[36] must have intended merely to limit lawful agreements to a *particular* jobsite.[37] Otherwise, unions would be free to "enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere."[38] In light of Congress' express desire to limit organizational and recognitional economic weapons, Congress could not have intended this result.[39] Accordingly, and because it was dealing with the *Denver Building Trades* problem, Congress "possibly" intended to privilege restrictive subcontracting agreements "to common-situs relationships on particular jobsites . . . ."[40] Thus, reasoning that since this is what Congress "possibly" intended, and since this intent is consistent with the overall statutory scheme, including its limitations on the use of economic force for organizational and recognition purposes, the Court appeared to hold that these agreements must be limited to relationships on a particular jobsite.[41]

To the question of how the lawful agreements should be limited, the Court gave two clues. First, it referred to Congress' intent to deal with the *Denver Building Trades* "problem," and second, out of concern for broad organizational impact, it limited 8(e) endorsement of subcontracting agreements to "common-situs *relationships* on partic-

33. Because the Court used the word "possibly" in describing Congress' intent to impose the requirement that a subcontracting agreement be limited to a particular jobsite, there may be some doubt that the Court really intended to make this a separate and particular requirement of § 8(e) legality. Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 633 (1975). The Court, however, dropped that word in its final decisional paragraph, indicating an intention to require such a limited scope for § 8(e) agreements. *Id.* at 635.

34. *Id.* at 630 (emphasis added).

35. *Id.*

36. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). *See* note 43 and accompanying text *infra*.

37. 421 U.S. at 632-33, 635.

38. *Id.* at 632.

39. *Id.* at 633.

40. *Id.*

41. *Id.* at 635.

ular jobsites . . . ."[42]

The *Denver Building Trades* decision of the Supreme Court concerned the picketing of a general contractor by a union to require the general contractor to dismiss from its construction job a subcontractor with whom the union had a dispute. The union picketed the general contractor only at the construction site where the disputed subcontractor was working. As Justice Douglas noted in his dissent,

> The union was not pursuing the contractor to other jobs. All the union asked was that union men not be compelled to work alongside nonunion men on the same job. As Judge Rifkind stated in an analogous case, "the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it."[43]

Accordingly, it seems that the *Connell* Court required that any restrictive subcontracting agreement must relate to and cover only one individual jobsite. Although it may be argued, given the Court's discussion of the intent of the section 8(e) proviso to protect union workers, that a general agreement between a union and a general contractor restricting subcontracting only to union firms on *any* job on which the agreeing union's members are employed by the general contractor would be *valid* under 8(e), such an agreement would extend beyond the *Denver* problem specifically referred to by the Court and would greatly expand the union's economic organizational weapon beyond that apparently deemed proper by the *Connell* Court. Therefore, the Court's rationale arguably privileges only those agreements negotiated in relation to a specific individual jobsite.

Moreover, the Court's overriding concern with not extending a union's use of a restricting subcontracting clause too far, and its pinpointing of Congress' intent in enacting the 8(e) proviso to the *Denver* problem, which dealt with a union's efforts to remove the subcontractor from a specific jobsite, seem to indicate that the Court intended not only that restrictive agreements be limited to a single specific construction project, but further, that a union and general contractor could not, by agreement or otherwise, compel a subcontractor to become a signatory to a union contract in regard to any work of that subcontractor other than on the specific jobsite covered by the subcontracting agreement. Thus, the subcontractor's "relationship" as a union contract signatory would be limited to the particular jobsite.[44] For example, if an otherwise nonunion contractor performing work on seven other job sites obtained a subcontract to

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42. *Id.* at 633 (emphasis added).

43. 341 U.S. 675, 692 (1951) (Douglas, J., dissenting) (quoting Douds v. Metropolitan Fed'n, 75 F. Supp. 672, 677 (S.D.N.Y. 1948)) (footnote omitted).

44. *Cf.* Pickens-Bond Constr. Co. v. United Bhd. of Carpenters Local 690, 99 L.R.R.M. 3321, 3325 (8th Cir. 1978) (union and contractor attempted to negotiate a settlement regarding

perform work on a site lawfully covered by a restrictive subcontracting agreement between the general contractor and a union, the subcontractor could be required to sign a union agreement, presumably under section 8(f), only regarding work on that specific site and could not be compelled to cover his other seven jobs and the employees working on them with a union contract.

C. The Union's Purpose Must Be To Protect Its Members From Working Alongside Nonunion Employees.

During its discussion of Congress' intent not to countenance the use of subcontracting agreements in the construction industry as a broad organizational weapon, but rather, to limit their use to a collective bargaining relationship at a single jobsite, the Court stated the function that the 8(e) construction *proviso* was intended to fill. "[T]he purpose of the section 8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site."[45] The Court went on to state that the agreement before it did not serve that purpose or function, for it was not limited to jobsites on which Local 100's members were working and it "applied only to the work Local 100's members would perform themselves . . . leaving open a possibility that they would be employed alongside nonunion subcontractors."[46] Accordingly, and again in an effort to carry out the congressional intent to limit the use of subcontracting agreements as an economic weapon for "top down" organizing, the Court seemed to hold that the above-quoted function of the 8(e) proviso must be met for such an agreement to be sanctioned by the 8(e) proviso; that is, the union seeking the agreement must be protecting *its*[47] members from having to work alongside nonunion employees.

To accomplish this purpose, a union may seek or be party to a restrictive agreement only with regard to specific jobs where its members will be working: its members have to be on the job to require the "protection". Thus, any agreement that generally restricts the subcontracting of the work covered by the union's agreement to only "union firms" would be invalid, for it would be possible that

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a nonunion subcontractor and the contractor urged the union to sign a one-job contract with the subcontractor).

45. 421 U.S. at 630 [quoting Drivers Local 695 v. NLRB, 361 F.3d 547, 553 (D.C. Cir. 1966).

46. *Id.* at 631.

47. The Court nowhere suggests that the union party to the restrictive subcontracting agreement has any interest in protecting, and the purpose of the section 8(e) proviso is not met by that union seeking to protect, members of other unions from being required to work alongside nonunion employees. In fact, the Court seems to limit the purpose of the section 8(e) proviso to the protection of members of the union seeking the agreement. "The agreement apparently was not designed to protect Local 100's members . . . ." *Id.* Therefore, the union's object must be to protect *its* members, not union interests generally.

none of that union's members would be on a specific job site. Furthermore, any general agreement that required subcontracting of the union's work only to subcontractors that were signatory to agreements with *it* would be invalid because the agreement would not insure that other employees on the job site would be "union." Even when the latter type agreement is coupled with a valid restriction on the subcontracting of all other work only to "union firms," it violates section 8(e), since that part of the agreement that requires the general contractor to subcontract the agreeing union's work only to union firms does not protect the agreeing union's members, but only the members of other unions.

In addition, if an agreement or series of agreements required that unit work be subcontracted only to companies meeting "union standards," and that all other work be subcontracted only to "union firms", the latter part of that agreement would violate 8(e), for the unit employees represented by the union might not be working on the job at all, and thus, would not require protection against working with nonunion employees.

Moreover, because the proviso was intended to protect union members from working alongside nonunion workers, the subcontracting agreement could lawfully restrict subcontracting to union firms only at a time when the contractor's unionized employees were actually working at the construction site.[48]

Finally, because the function of 8(e) is not to provide unions with a broad organizational weapon, but is merely to protect union employees from working alongside nonunion employees on the same site, the Court seemed to intend that an otherwise lawful restrictive subcontracting agreement could not limit subcontracting only to firms who had an agreement with a specific union or unions.[49]

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48. Connell Memorandum, *supra* note 9, at 297, 304, 311-12.

49. Passages throughout the Court's opinion (as well as the congressional objective of limiting the use of subcontracting agreements as organizational weapons) support this view. *See* 421 U.S. at 631-33. As part of its antitrust discussion, the Court noted that "[t]he agreements with general contractors did not simply prohibit subcontracting to *any nonunion firm*; they prohibited subcontracting to any firm that did not have a contract with Local 100." *Id.* at 624 (emphasis added). Also, the Court found inappropriate an agreement limiting subcontracting to a firm having a contract with Local 100. Furthermore, the Court's discussion of the purpose of the proviso deals with the interests of union employees working next to other *union* employees, and nowhere mentions any legitimate need to specify the union alongside whom their members must work. Indeed, as the latter specificity would greatly enhance the use of the subcontracting agreement as an organizational weapon, it would seem to be barred by section 8(e).

The Court suggested, moreover, that in enacting the section 8(e) proviso, Congress intended simply to preserve the status quo under Local 1976, United Bhd. of Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958). *See* 421 U.S. at 629 n.8. In *Sand Door*, the Court was dealing with a restrictive clause providing that workmen shall not be required to handle nonunion material, and a clause directed at an "unfair company." Although *Sand Door* did not consider the validity of such a clause, and thus, presumably considered it legal for its purposes, it clearly was dealing with a general "nonunion" clause, and not one specifying any particular union. To the extent that the section 8(e) proviso was intended only to maintain the

Therefore, following the *Connell* decision it appears that a union could negotiate a valid restrictive subcontracting agreement only if it had a collective bargaining relationship with a general contractor, only if the agreement covered a specific job where its members were employed or were to be employed, and only if that agreement provided that all work subcontracted by the general contractor to be performed on that construction site would be subcontracted only to "union firms."[50] The NLRB, however, reads *Connell* very differently.

IV. The Labor Board Decisions

In *Carpenters Locals 944 and 235, United Brotherhood of Carpenters (Woelke & Romero Framing)*,[51] the Board dealt with a carpenter's union contract demand (the union had represented Woelke's employees for years) that included the following restrictive subcontracting proposals:

> 103.2 The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, alteration, painting or repair of a building, structure or other work (including quarries, rock, sand and gravel plants, asphalt plants, ready-mix concrete plants, established on or adjacent to the jobsite to process or supply materials for the convenience of the Contractor for jobsite use) except to a person, firm or corporation, party to an appropriate current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.
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> * * *
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> 103.3.1 The Contractor and his subcontractors shall not subcontract any jobsite work, except to a contractor whose employees on that job are members of a bona-fide labor organization, and whose labor costs on such job, at all times during the term of his subcontract hereunder, are not less than those of contractors per-

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status quo under the *Sand Door* decision, only such general clauses are legitimate under the proviso.

It might be argued that this construction of the Court's opinion in *Connell* is contrary to the implicit holdings in cases such as Essex County & Vicinity Dist. Council of Carpenters v. NLRB, 332 F.2d 636 (3d Cir. 1964), and Dallas Bldg. & Constr. Trades Council v. NLRB, 396 F.2d 677 (D.C. Cir. 1968). These cases upheld, as protected by the section 8(e) proviso, agreements providing that work done by other than members of the union seeking or signatory to the agreement must be done only by firms signatory to clauses with specific unions. The courts' opinions in those cases do not reveal, however, any argument that such clauses were invalid because they were so limited to specific unions. *See* the Court's discussion of Los Angeles Bldg. & Constr. Trades Council, 214 N.L.R.B. 562 (1974) in Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 631-32 n.10 (1975). Moreover, to the extent that *Connell* is inconsistent with those earlier lower court opinions, they are, arguably, implicitly overruled on this point. Indeed, the Board's General Counsel takes the position that limiting subcontracting to employers with contracts with specific unions violates section 8(e). Connell Memorandum, *supra* note 9, at 298.

50. The agreement may not specify any particular union or unions, such as "an AFL-CIO Union," "a member of the Local AFL-CIO Trade Council," etc.

51. 99 L.R.R.M. 1580 (1978).

> forming similar work to that covered by this Agreement, including, but not limited to, costs of subsistence, vacation, holiday, medical, hospitalization, wages, premiums, dental, life insurance and retirement benefits as provided by this Agreement.[52]

Woelke refused to agree to these clauses and the union picketed him. Woelke then filed unfair labor practice charges alleging that the clauses violated section 8(e) and that the picketing to obtain agreement on them violated section 8(b)(4)(A).

The Board had no trouble finding that both clauses were "secondary" and thus violative of section 8(e) unless privileged by the proviso. Clause 103.2 clearly was not a primary "union standards" clause, but required that any subcontractor be "signatory" to a union agreement. In addition, it required that all subcontractors be signatory to union contracts, not just subcontractors who were performing work historically done by the represented carpenters. Clause 103.3.1 was also secondary for it did not merely require that the economic equivalent of wages and fringes be paid, but further required that each subcontractor be signatory to a union contract.[53]

The Board than went on to determine whether these clauses were privileged by the 8(e) construction proviso. On this issue the General Counsel, citing *Connell*, argued that the clauses were not privileged because they were not limited to only jobsites where Woelke employed carpenters represented by the union, and because they required that subcontractors have agreements with particular unions.[54] The Board, reading *Connell* very narrowly, simply dismissed the General Counsel's arguments with the conclusion that the *Connell* Court required nothing more than a collective bargaining relationship between the union seeking a clause restricting the subcontracting of jobsite work and the contractor from whom it sought such an agreement.[55]

In *Colorado Building and Construction Trades Council*,[56] the company, Utilities Services Engineering, had no collective bargaining relationship with any union. Nonetheless, the Colorado Building and Construction Trades Council sent it a letter requesting that it sign a restrictive subcontracting agreement to eliminate substandard wages in the area. When the company failed to respond to the letter,

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52. 99 L.R.R.M. at 1582.

53. Although the Board did not mention it, the clause also appears to be secondary because it requires "union standards" of all subcontractors, not just those performing what is historically carpenters' work.

54. The parties conceded that a collective bargaining relationship existed between Woelke and the Carpenters. 99 L.R.R.M. at 1581-82.

55. Indeed, the Board went even further and suggested that the clauses might have been lawful even without a bargaining relationship if they were aimed at avoiding a *Denver Building Trades* problem. *See* notes 36-42 and accompanying text *supra*. The Board expounded further on this in Colorado Constr. Trades Council, 99 L.R.R.M. 1601, 1604 (1978). *See* notes 61-63 and accompanying text *infra*.

56. 99 L.R.R.M. 1601 (1978).

the Council picketed it. The company filed an 8(b)(4)(A) charge, and the issue was whether the requested agreement violated section 8(e). The agreement contained the following clauses:

> This contract shall govern, and be limited to, labor performed at the site of construction, alteration, painting, or repair of building, structure, or other work of the Contractor by sub-contractors, *and shall be limited to work which is not customarily performed by employees of the Contractor.* This agreement shall not apply to work on any project for the performance of which the Contractor has entered into a sub-contract on or before the date of execution of this Agreement. Nor shall this Agreement apply to any work performed by any employee or employees in a certified or recognized collective bargaining unit, or by any employee or employees who have a representative for collective bargaining.
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> * * *
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> It shall be the obligation of the Contractor to include in every sub-contract for work governed by this Agreement a provision requiring the payment of prevailing rates of wages for such work. In the event any sub-contractor shall fail to pay its employees the prevailing rates of wages for work within the scope of this Agreement, the Contractor shall make whole the employees of sub-contractors for all losses and damages which they sustain by reason of the sub-contractor's default.[57]

Again, the Board lost no time in concluding that the clauses were secondary, for the clauses did not seek to protect the work of unit employees, but rather, sought to protect only other employees. Indeed, the Board noted that there was no contractual unit because the union did not represent anyone.[58] In addition, the first clause specifically stated that the agreement applied only to work "not customarily performed by employees of the Contractor."

The Board then turned to the *Connell* issue. The General Counsel argued that the clauses were not privileged by the 8(e) proviso because there was no collective bargaining relationship and because the agreement was not limited to times and places when the contractor would have its employees working. The Union (Council) argued that *Connell* should be limited only to situations in which the union seeking such clauses is trying to organize subcontractors. The Board rejected the union's argument and found a violation.[59] First, the Board held, as it had in *Woelke*, that a collective bargaining relationship was normally required between a union and a construction contractor before a restrictive subcontracting agreement would be privileged by the 8(e) proviso.[60] Since no relationship existed in this case, the Board held that 8(e) would be violated by an agreement on the clauses, except that they might be protected by the proviso if they

57. *Id.* at 1602 (empahsis added).
58. *Id.* at 1603.
59. *Id.*
60. *Id.* at 1604. *See also* notes 54-55 and accompanying text *supra*.

were aimed at avoiding a *Denver Building Trades* problem.[61]

The Board then described in general terms the *Denver* problem by stating that some kind of restrictive clauses might be privileged, even without a bargaining relationship, if they were "addressed to problems posed by the common situs relationships on a particular jobsite or to the reduction of friction between union and nonunion employees at a jobsite."[62] The clauses in question, however, did not meet this standard. First, the clause neither restricted the subcontracting of nonunit work to union subcontractors nor applied only to job sites where union members were working; the clause allowed the possibility that union and nonunion employees would be working on the same job. Second, the Union was not seeking to organize any subcontractors, and indeed, no subcontracting was being done by the contractor at the picketed job. Accordingly, said the Board, the clauses could not have been aimed at avoiding problems arising from the contractor-subcontractor relationship on the construction site. Thus, as neither *Denver* problem was addressed by the clauses, they were not protected by the 8(e) *proviso*.[63]

Los Angeles Building and Construction Trades Council[64] involved a demand and picketing by the Carpenters Union to obtain a full collective bargaining agreement from a construction contractor with whom it had no preexisting bargaining relationship but with whom it could lawfully enter into a prehire agreement pursuant to section 8(f) of the Act. The main issue in the case was whether a union attempt to establish an 8(f) relationship was sufficient to meet the *Connell* requirement of a "collective bargaining relationship."[65] The Board held, probably correctly, that this was sufficient.[66]

Subsidiary issues involved the General Counsel's contentions that the obviously secondary restrictive subcontracting clauses contained in the contract were not privileged because they were not limited to sites where union-represented employees would be working and the clauses required that any subcontractor have an agreement with specific unions ("affiliated with the Building and Construction Trades Department, AFL-CIO . . ."). The Board, as it had in *Woelke*, dismissed those arguments on the ground that *Connell* required no more than a bargaining relationship to privilege an 8(e) construction site agreement between a union and an employer in the construction industry.[67] The Board further held that picketing to ob-

61. 99 L.R.R.M. at 1604.

62. The Board specifically declined to describe the type of clause that the proviso might privilege as dealing with the *Denver* problem. *Id.* at 1604.

63. *Id.*

64. 99 L.R.R.M. 1593 (1978).

65. *See* notes 23-32 and accompanying text *supra*.

66. 99 L.R.R.M. at 1598.

67. *See* note 55 and accompanying text *supra*.

tain an 8(f) agreement was controlled by section 8(b)(7) of the Act,[68] which, in the case of unrepresented employees, allows such picketing to continue for a reasonable period of time not to exceed thirty days.[69] Yet, the the Board did find the restrictive subcontracting clauses to be invalid under section 8(e), not because of any failure to meet *Connell* requirements, but because the clauses allowed the union to enforce them by strike or picketing.[70]

Finally, the *International Union of Operating Engineers Local 70*[71] decision of the Board dealt with a signatory, and thus secondary, subcontracting clause in an agreement that allowed the union to strike or picket to enforce the clause. The Board found that the clause met the *Connell* standards for the same reasons expressed in *Woelke*, but that the clause violated 8(e) because of the "self help" (strike and picketing) enforcement provisions that applied to it.[72]

In summary, the Board has read *Connell* very narrowly. Instead of concluding that a restrictive subcontracting agreement must relate to a particular jobsite and protect union employees from working beside nonunion employees, as well as arise from a bargaining or 8(f) relationship, the Board has held that those first two standards are means alternative to the bargaining relationship by which a subcontracting clause may become privileged under the 8(e) proviso. In so interpreting *Connell*, the Board has also rejected any contention that 8(e) is violated by a clause restricting subcontracting only to firms having agreements with a specific unions.

Assuming for the moment that the Board's analysis is correct, a question arises concerning under what kind of clause and under what circumstances will a union and an employer be privileged to negotiate. If the union has a bargaining relationship or is seeking a valid 8(f) agreement,[73] then the clause may restrict subcontracting to subcontractors either meeting union standards or having specific union contracts, provided the clause is not enforceable by strikes or

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68. 99 L.R.R.M. at 1599.

69. 29 U.S.C. § 158(b)(7)(c) (1976).

70. *See* notes 17-18 and accompanying text *supra*. The subcontracting clauses themselves contained no specific enforcement provisions, but the agreement's provisions for settling grievances and disputes provided,

> Nothing contained in the Agreement, or any part thereof, shall affect or apply to the Union in *any action* it may take against any Contractor or subcontractor who has failed, neglected or refused to comply with or execute any settlement or decision reached at any step of the grievance procedure or through Arbitration under the terms of Article V hereof.

99 L.R.R.M. at 1599 (emphasis added).

71. 99 L.R.R.M. 1589 (1978).

72. 99 L.R.R.M. at 1591-92.

73. An industrial employer acting as its own general contractor may not enter into a valid § 8(f) agreement, for he is not engaged "primarily" in construction as required by § 8(f). *See* note 32 *supra*.

picketing. Thus, either of the following would seem to be privileged by the Board's decisions:

> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, except to a firm party to an agreement with a union affiliated with the Building and Construction Trades Department, AFL-CIO. Failure to comply with this clause shall entitle the Union to judicial relief only.
>
> The Contractor agrees that neither he nor any of his subcontractors on the jobsite will subcontract any work to be done at the site of construction, except to a firm whose labor costs are not less than those of contractors performing work under contracts with a union affiliated with the Building and Construction Trades Department, AFL-CIO. Failure to comply with this clause shall entitle the Union to judicial relief only.

Nevertheless, if the union does not have a bargaining relationship and is not seeking a valid 8(f) agreement, then it will be risky, even under the Board's analysis of *Connell*, to negotiate any subcontracting restrictions.[74] For the daring, however, it may be possible in these circumstances to negotiate a union signatory clause covering all work at the construction site; but it would seem that the clause must be limited to one specific jobsite, members of the negotiating union must be working on that job, and the clause must require that even subcontracted unit work go only to union signatory firms.[75] Thus, the following clause may be valid:

> The Contractor agrees that if members of this Union are working on this specific job he shall not subcontract any work to be done on the site of construction of this single specific job to any firm that is not a party to an agreement with a union affiliated with the Building and Construction Trades Department of the AFL-CIO, provided that the firm to which work is subcontracted shall meet the requirements of this clause if it enters into an agreement with an affiliated Union that is limited to this specific job. Failure to comply with this clause shall entitle the Union to judicial relief only.

V. Is It Wise To Rely Upon The Board?

The Board's analysis of *Connell* will not be the final word. Reviewing courts will scrutinize the Board's decisions. Even more troublesome is the fact that antitrust litigation, like *Connell* itself, will proceed against employers and unions—and the result of an un-

74. Even an otherwise valid "union standards" clause would appear to be secondary because the union represents no "unit" whose work is intended to be preserved. *See* Colorado Bldg. & Constr. Trades Council, 99 L.R.R.M. 1601, 1603 (1978).

75. Under the Board's analysis of *Connell*, it would appear that such a clause would more likely be valid if there is a specific nonunion contractor, working on the specific job in question, that the union is attempting to organize. Although that factor seems to be directly counter to the *Connell* Court's concern about "top down" organizing, it is apprarently a favorable consideration for legality as the Board views it. *See* Colorado Bldg. & Constr. Trades Council, 99 L.R.R.M. 1601, 1603-04 (1978).

privileged clause in the eyes of the FTC[76] and courts may be treble damage awards against unions and contractors. Thus, the question whether one shall rely upon these recent Board decisions and negotiate accordingly necessarily arises. In the author's judgment, one should not rely upon these decisions since one cannot be sure that the Board is correct.

This uncertainty is based upon several considerations. First, it is most natural for the Board to read *Connell* very narrowly, not because of any pro-union bias, but because its experience with labor relations over the years lead it to the pre-*Connell* conclusion that clauses such as the one involved in *Connell* simply did not violate section 8(e).[77] The Supreme Court disagreed, as it may well disagree with the new narrow reading of *Connell* adopted by the Board.

Second, the General Counsel of the NLRB disagrees with the Board's narrow reading of *Connell*[78] and at least one respected lawyer on the union's side believes *Connell* raises the question whether subcontracting clauses must be limited to a particular jobsite.[79]

Third, even the Federal Trade Commission endorses the concept that even a restrictive agreement negotiated within a collective bargaining relationship may be enforced only when union members are actually working on the job site,[80] a requirement that some of the most expansive readers of *Connell* doubt the Court ever intended.[81]

Fourth, a number of courts interpret *Connell* to mean that even agreements arrived at within a bargaining relationship must also meet additional requirements to be protected by the 8(e) proviso. Thus, the agreement must be limited to a particular jobsite[82] and must seek to eliminate friction between union and nonunion employees by applying only to sites on which the union's members are working.[83]

Last, the Board's reading of *Connell* does not appear to meet the Supreme Court's voiced concerns. Thus, for example, to privilege

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76. *See* the report of the Federal Trade Commission consent agreement involving the Alaska Teamsters in 138 DAILY LABOR REPORT A-1 (BNA, July 18, 1978).

77. *See, e.g.*, Los Angeles Bldg. & Constr. Trades Council, 214 N.L.R.B. 562 (1974); Plumbers Local 100 (Hagler Construction Co.), NLRB Case No. 16-CC-447 (May 1, 1974). The Supreme Court cited both of these cases in Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616-32 n.10 (1975).

78. Connell Memorandum, *supra* note 9, at 296.

79. *See* 132 DAILY LABOR REPORT A-1 (BNA, July 9, 1975) (report of comments by George Kaufman to the Labor Relations Committee of the Federal Bar Association).

80. *See* note 76 *supra*.

81. *See* Hotvedt & Sisco, *FTC Move on Alaska Teamsters Marks First Step in Labor Field*, Legal Times of Wash., Sept. 4, 1978, at 10, 12.

82. Operating Eng'rs Local 370 v. Neilsen & Co., 92 L.R.R.M. 2861 (1975).

83. *See* NLRB v. International Union of Operating Eng'rs Local 542, 532 F.2d 902, 906-07 (3d Cir. 1976); Long v. Floorcraft Carpet Co., 95 L.R.R.M. 3143, 3144 (1977); Waggoner v. R. McGray, Inc., 432 F. Supp. 580, 583 (C.D. Cal. 1977); Operating Eng'rs Local 370 v. Neilsen & Co., 92 L.R.R.M. 2861, 2863-64 (D. Idaho 1975).

any restrictive subcontracting agreement merely because it is negotiated in the context of a bargaining relationship would allow massive "top down" organizing, for every subcontractor working on every job of every contractor bound by the agreement would be required to sign a union agreement covering everyone of the subcontractor's jobs. Then, if the Board is correct and subcontracting agreements may be privileged even without a bargaining relationship if they are directed at protecting unionized labor from working alongside nonunion labor, the union representing the subcontractor's employees could seek a subcontracting agreement from every general contractor on the jobs where the subs are working requiring that all onsite work on those jobs be done only by union contractors or subs.

To illustrate, assume the Laborers Union has a bargaining relationship with contractor A and obtains an agreement restricting subcontracting only to firms with AFL-CIO contracts. Assume A is performing seven jobs and employs five different subs on each job. Those thirty-five subcontractors will all have to sign AFL-CIO contracts that will cover not only their work for A but for any other contractor as well. Assume each of those thirty-five subcontractors is working on two other jobs. The union with whom each has an agreement can then go to the general contractor on each of those seventy other jobs and seek an agreement restricting subcontracting of all work on those jobs to only AFL-CIO firms in order to protect their members for having to work beside nonunion members. If each of those seventy jobs employed but two subcontractors each, 210 more firms (including the general contractors) would be unionized, at least for those jobs. In theory, then, one restrictive agreement negotiated under the Board's reading of *Connell* could result in the unwilling unionization of 315 units of employees, all by AFL-CIO unions. Although it is extremely unlikely that such a result would ever apply as a practical matter, the example does serve to illustrate the "top down" organizing potential encompassed by the Board's reading of *Connell.*

On the other hand, a broader reading of *Connell*, consistent with that suggested earlier in this discussion, is illustrated by the following example. Again, assume the Laborers Union has a bargaining relationship with contractor A and obtains an agreement restricting subcontracting on one particular job where union laborers are working to subs who have union contracts on that job only. Again, assume seven subcontractors are hired. Union laborers will not have to work next to nonunion workers, but only one job each for seven subcontractors will be union-organized and even then the employees of these subcontractors might have some choice regarding which union they want to represent them.

In sum, the major goal of the Supreme Court in *Connell* was to uphold Congress' desire to limit "top down" organizing in the construction industry. The Board's reading of *Connell* does little if anything to uphold that policy. As a result, the Board's recent decisions may not stand the test of time.

VI. Conclusion

The remaining issue is what should construction unions and employers do now? It seems clear that construction contractors and unions may agree upon the following clause:

> The Employer agrees that he shall not subcontract any work to be done on the site of construction of this single specific job (whether or not that work comes within the territorial and occupational jurisdiction of the union), but only if such work is to be performed contemporaneously with the work of the unit of the Employer's employees,[84] to any employer, company or concern that is not a party to a collective bargaining agreement with a union (meaning *any* organization or group meeting the definition of a "labor organization" under § 2(5) of the NLRA), provided, however, that such employer, company or concern to which such work is to be subcontracted shall meet the above requirements if it enters into a collective bargaining agreement with any union limited only to its work and the work of its employees on this single specific job and provided further, that this agreement shall supersede and replace, for the duration of this specific job and only in relation to the work to be done at the site of construction of this specific job, any and all other subcontracting restrictions (including restrictions limiting subcontracting to employers, companies and concerns who provide equivalent economic employment conditions) contained in all collective bargaining agreements between the Employer and any Union, and if any such subcontracting restriction may not be so superseded and replaced then the subcontracting restriction set forth in this paragraph shall be null and void. Failure to comply with this clause shall entitle the union to seek judicial relief only.[85]

But suppose the bargaining union wants a more restrictive clause in line with those recently approved by the NLRB, and strikes to obtain the clause. At that point the contractor is caught between a rock and a hard place. No injunctive relief against the strike is available under section 10(1) of the Act via the filing of an 8(b)(4)(A) charge,[86] for the Board would find no 8(b)(4)(A) violation.[87] Similarly, although the Supreme Court left open the question in *Con-*

84. There is a real question whether the phrase limiting the applicability of subcontracting restrictions to times when the contractor's union employees are working is necessary. *See* note 81 *supra*. The Federal Trade Commission apparently deems such a phase necessary to avoid antitrust liability. *See* note 76 *supra*.

85. For this clause to be valid, the union and the employers must have a collective bargaining or a § 8(f) relationship and the employer must be employing or intending to employ the union's members on the site of the specific job in question. *See also* note 32 *supra*.

86. 29 U.S.C. § 160(1) (1976).

87. *See* notes 51-55 and accompanying text *supra*.

nell,[88] it would appear that the Norris-LaGuardia Act forecloses injunctive relief against union picketing to obtain such a clause.[89]

Thus, the contractor who cannot stand a prolonged strike is left with the alternative of agreeing to a clause that may subject him to treble antitrust damages. In such a case, the contractor may simply refuse to abide by the clause and leave himself open to possible damage actions by unions representing employees who would have worked had the subcontracting been done in accordance with the clause. The preferable course, however, would seem to be the one taken by Connell—agree to the clause under protest and commence a court action under the antitrust laws to declare the clause invalid. Although such an action will not necessarily shield the contractor from antitrust suits if he abides by the subcontracting clause in the interim, if the suit includes a request to enjoin the implementation of the clause and a preliminary injunction can be obtained, the contractor should be effectively protected.[90]

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88. Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 637-38 n.19 (1975).

89. *See* Utilities Serv. Eng'r, Inc. v. Colorado Bldg. & Constr. Trades Council, 549 F.2d 173, 178 (10th Cir. 1977).

90. *See generally* 6A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 57.10 (1974 & Supp. 1977-78). *See also* Allen Bradley Co. v. Local 3, International Bld. of Elec. Workers; 325 U.S. 797 (1945); Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n, 155 F.2d 799 (3d Cir. 1946). *Cf.* Huge v. Long's Hauling Co., 590 F.2d 457 (3d Cir. 1978) (employer filed counterclaim against trustees of pension fund and asserted violation of antitrust and labor laws as a defense to trustees' suit); Operating Eng'rs, Local 370 v. Neilsen 7 Co., 92 L.R.R.M. 2861 (D. Idaho 1975) (employer asserted antitrust violation as a defense in a suit for breach of a collective bargaining agreement).